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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,353	12/07/2001	Shinsuke Mochizuki	0505-0941P	8091

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BIRCH STEWART KOLASCH & BIRCH
PO BOX 747
FALLS CHURCH, VA 22040-0747

EXAMINER

JIMENEZ, MARC QUEMUEL

ART UNIT PAPER NUMBER

3726

DATE MAILED: 08/26/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/005,353

Applicant(s)

MOCHIZUKI ET AL.

Examiner

Marc Jimenez

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-4 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 07 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☒ Certified copies of the priority documents have been received in Application No. 09/371,509.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) <u>2</u> . | 6) <input type="checkbox"/> Other: . |

DETAILED ACTION

Priority

1. Acknowledgment is made of applicant's claim for foreign priority under 35 U.S.C. 119(a)-(d). The certified copy has been filed in parent Application No. 09/371,509, filed on 8/10/1999.
2. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 120 as follows:

An application in which the benefits of an earlier application are desired must contain a specific reference to the prior application(s) in the first sentence of the specification or in an application data sheet (37 CFR 1.78(a)(2) and (a)(5)). The specific reference to any prior nonprovisional application must include the relationship (i.e., continuation, divisional, or continuation-in-part) between the applications except when the reference is to a prior application of a CPA assigned the same application number.

Specification

3. The title of the invention is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed. The following title is suggested:

- - A method of fabricating a vehicle body frame for a motorcycle - -.

Claim Objections

4. **Claim 3** is objected to because of the following informalities: “the stops” in line 2 should read - - the steps - -. Appropriate correction is required.

Claim Rejections - 35 USC § 112

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. **Claims 1-4** are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites “an integrated article” in line 5. In reading the claim, it is unclear whether “an integrated article” consists of:

- (a) both of the “die cast products and non-die cast products” or,
- (b) if “an integrated article” refers to only one of the “die cast products” and the “non-die cast products” or,
- (c) if “an integrated article” is an element different from the “die cast products” and the “non-die cast products”.

Claim 1 recites “coating only die cast portions” in line 6. This limitation is unclear because “an alumite treating” in line 5 is a coating process. If “an integrated article” in line 5 of claim 1 is referring to both the “die cast products” and “non-die cast products”, then the limitation “subjecting an integrated article to an alumite treating” means that both of the “die cast

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products” and “non-die cast products” are coated by alumite treating and therefore the limitation “coating only die cast portions” in line 6 of claim 1 is unclear because of the “only” limitation.

In reading applicant’s specification, it appears that claim 1 should have been written as follows:

A method of fabricating a vehicle body frame for a motorcycle comprising the following steps: integrating aluminum series die cast products and aluminum series non-die cast products fabricated by a method other than die casting to create an integrated article; subjecting the [[an]] integrated article to an alumite treating coating; and additionally coating only die cast portions of the die cast products.

However, it is unclear whether applicant intended to claim the invention in this manner. Clarification is requested in response to this office action.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. **Claim 1** is rejected as best understood under 35 U.S.C. 103(a) as being unpatentable over Applicant’s Admitted Prior Art [AAPA] (Fig. 7-8 and page 1-3 of applicant’s specification) in view of Sato (5,845,383).

[AAPA] teaches integrating (page 3, lines 1-2) aluminum (page 2, lines 4-5) series die

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cast products **101,104** (page 1, lines 12-13, page 2, lines 13-14) and aluminum series non-die cast products **102** (page 2, lines 17-19), and subjecting an integrated article to an alumite treating (page 3, lines 3-5).

[AAPA] teaches the invention cited with the exception of coating die cast portions.

Sato teaches die casting an aluminum (col. 7, line 2), performing alumite treatment (col. 7, lines 21-22), and then coating the die cast portions (col. 8, lines 38-40, ie. a painting treatment).

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of [AAPA] with coating die cast portions, in light of the teachings of Sato, in order to coat the products to the desired color tone.

9. **Claim 1** is rejected as best understood under 35 U.S.C. 103(a) as being unpatentable over Kobayashi et al. (JP 403136993 A) in view of Sato.

Kobayashi et al. teach integrating aluminum series die cast products **51** (constitution, lines 3-4) and aluminum series non-die cast products **52L,55R,58L,55R** (constitution, lines 4-5). It is noted that the die cast product **51** is considered the claimed "an integrated article".

Kobayashi et al. teach the invention cited with the exception of subjecting an integrated article to an alumite treating and coating only die cast portions.

Sato teaches die casting an aluminum (col. 7, line 2), performing alumite treatment (col. 7, lines 21-22), and then coating the die cast portions (col. 8, lines 38-40, ie. a painting treatment).

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of Kobayashi et al. with coating only the die cast portions, in light of the teachings of Sato, in order to coat the products to the desired color tone.

10. **Claims 2 and 3** are rejected as best understood under 35 U.S.C. 103(a) as being unpatentable over [AAPA] in view of Sato as applied to claim 1 above, and further in view of Matsuura et al. (6,041,499).

[AAPA]/Sato teach the invention cited with the exception of die casting under high pressure.

Matsuura et al. teach die casting under high pressure (col. 3, lines 55-64).

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of [AAPA]/Sato with die casting under high pressure, in light of the teachings of Matsuura et al., in order to quickly form the desired cast shape.

Regarding claim 3, it is noted that [AAPA] teaches that the pivot plates **104** are die cast (page 2, lines 13-14 of applicant's specification) and projecting shot grain onto the pivot plates for finishing the surface (page 2, lines 15-16 of applicant's specification).

11. **Claims 2** is rejected as best understood under 35 U.S.C. 103(a) as being unpatentable over Kobayashi et al. in view of Sato as applied to claim 1 above, and further in view of Matsuura et al. (6,041,499).

Kobayashi et al./Sato teach the invention cited with the exception of die casting under high pressure.

Matsuura et al. teach die casting under high pressure (col. 3, lines 55-64).

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of Kobayashi et al./Sato with die casting under high pressure, in light of the teachings of Matsuura et al., in order to quickly form the desired cast shape.

12. **Claim 3** is rejected as best understood under 35 U.S.C. 103(a) as being unpatentable over Kobayashi et al. in view of Sato and Matsuura et al. as applied to claim 2 above, and further in view of [AAPA].

Kobayashi et al./Sato/Matsuura et al. teach the invention cited with the exception of projecting shot grain on the pivot plates.

[AAPA] teaches that the pivot plates **104** are die cast (page 2, lines 13-14 of applicant's specification) and projecting shot grain onto the pivot plates for finishing the surface (page 2, lines 15-16 of applicant's specification).

It would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of Kobayashi et al./Sato/Matsuura et al. with projecting shot grain on the pivot plates, in light of the teachings of [AAPA], in order to create a smooth finish surface.

13. **Claim 4** is rejected under 35 U.S.C. 103(a) as being unpatentable over [AAPA] in view of Sato as applied to claim 1 above, and further in view of Yamagiwa et al. (5,375,677).

[AAPA]/Sato teach the invention cited with the exception of having a gate speed of 5-15 m/s.

Yamagiwa et al. teach that it is known to have a gate speed that is made higher than 50 cm/s (or .5 m/s).

Therefore, it would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of [AAPA]/Sato with a gate speed of 5-15 m/s, in light of the teachings of Yamagiwa et al., in order to increase the speed of production of the motorcycle parts.

It is noted that in the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d, 191 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990) (See also attached section of MPEP 2144.05 (I)).

Furthermore, it would have been obvious to one of ordinary skill in the art at the time of the invention, to have made the prior art at the claimed ranges, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233. (See also attached section of MPEP 2144.05 (II)).

14. **Claim 4** is rejected under 35 U.S.C. 103(a) as being unpatentable over Kobayashi et al. in view of Sato as applied to claim 1 above, and further in view of Yamagiwa et al. (5,375,677).

Kobayashi et al./Sato teach the invention cited with the exception of having a gate speed of 5-15 m/s.

Yamagiwa et al. teach that it is known to have a gate speed that is made higher than 50 cm/s (or .5 m/s).

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Therefore, it would have been obvious to one of ordinary skill in the art, at the time of the invention, to have provided the invention of Kobayashi et al./Sato with a gate speed of 5-15 m/s, in light of the teachings of Yamagiwa et al., in order to increase the speed of production of the motorcycle parts.

It is noted that in the case where the claimed ranges “overlap or lie inside ranges disclosed by the prior art” a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d, 191 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990) (See also attached section of MPEP 2144.05 (I)).

Furthermore, it would have been obvious to one of ordinary skill in the art at the time of the invention, to have made the prior art at the claimed ranges, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233. (See also attached section of MPEP 2144.05 (II)).

Contact Information

15. Telephone inquiries regarding the status of applications or other general questions, by persons entitled to the information, should be directed to the group clerical personnel. In as much as the official records and applications are located in the clerical section of the examining groups, the clerical personnel can readily provide status information. M.P.E.P. 203.08. The Group clerical receptionist number is (703) 308-1148.

If in receiving this Office Action it is apparent to applicant that certain documents are missing, e.g., copies of references cited, form PTO-1449, form PTO-892, etc., requests for copies

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of such papers or other general questions should be directed to Tech Center 3700 Customer Service at (703) 306-5648, or fax (703) 872-9301 or by email to CustomerService3700@uspto.gov.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Jimenez whose telephone number is **703-306-5965**. The examiner can normally be reached on **Monday-Friday, between 5:30 am- 2:00 pm**.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Greg Vidovich can be reached on 703-308-1513. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.


Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1148.

Other helpful telephone numbers are listed for applicant's benefit.

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Marc Jimenez
Patent Examiner
AU 3726

MJ
August 22, 2003

ous. *Ex parte Gray*, 10 USPQ2d 1922 (Bd. Pat. App. & Inter. 1989).

Factors to be considered in determining whether a purified form of an old product is obvious over the prior art include whether the claimed chemical compound or composition has the same utility as closely related materials in the prior art, and whether the prior art suggests the particular form or structure of the claimed material or suitable methods of obtaining that form or structure. *In re Cofer*, 354 F.2d 664, 148 USPQ 268 (CCPA 1966) (Claims to the free-flowing crystalline form of a compound were held unobvious over references disclosing the viscous liquid form of the same compound because the prior art of record did not suggest the claimed compound in crystalline form or how to obtain such crystals.).

See also *Ex parte Stern*, 13 USPQ2d 1379 (Bd. Pat. App. & Inter. 1987) (Claims to interleukin 2 (a protein with a molecular weight of over 12,000) purified to homogeneity were held unpatentable over references which recognized the desirability of purifying interleukin 2 to homogeneity in a view of a reference which taught a method of purifying proteins having molecular weights in excess of 12,000 to homogeneity wherein the prior art method was similar to the method disclosed by appellant for purifying interleukin 2.).

Compare *Ex parte Gray*, 10 USPQ2d 1922 (Bd. Pat. App. & Inter. 1989) (Claims were directed to human nerve growth factor b-NGF free from other proteins of human origin, and the specification disclosed making the claimed factor through the use of recombinant DNA technology. The claims were rejected as *prima facie* obvious in view of two references disclosing b-NGF isolated from human placental tissue. The Board applied case law pertinent to product-by-process claims, reasoning that the prior art factor appeared to differ from the claimed factor only in the method of obtaining the factor. The Board held that the burden of persuasion was on appellant to show that the claimed product exhibited unexpected properties compared with that of the prior art. The Board further noted that "no objective evidence has been provided establishing that no method was known to those skilled in this field whereby the claimed material might have been synthesized." 10 USPQ2d at 1926.).

2144.05 Obviousness of Ranges [R-1]

See MPEP § 2131.03 for case law pertaining to rejections based on the anticipation of ranges under 35 U.S.C. 102 and 35 U.S.C. 102/103.

I. OVERLAP OF RANGES

In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990) (The prior art taught carbon monoxide concentrations of "about 1-5%" while the claim was limited to "more than 5%." The court held that "about 1-5%" allowed for concentrations slightly above 5% thus the ranges overlapped.); *In re Geisler*, 116 F.3d 1465, 1469-71, 43 USPQ2d 1362, 1365-66 (Fed. Cir. 1997) (Claim reciting thickness of a protective layer as falling within a range of "50 to 100 Angstroms" considered *prima facie* obvious in view of prior art reference teaching that "for suitable protection, the thickness of the protective layer should be not less than about 10 nm [i.e., 100 Angstroms]." The court stated that "by stating that 'suitable protection' is provided if the protective layer is 'about' 100 Angstroms thick, [the prior art reference] directly teaches the use of a thickness within [applicant's] claimed range."). Similarly, a *prima facie* case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties. *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985) (Court held as proper a rejection of a claim directed to an alloy of "having 0.8% nickel, 0.3% molybdenum, up to 0.1% iron, balance titanium" as obvious over a reference disclosing alloys of 0.75% nickel, 0.25% molybdenum, balance titanium and 0.94% nickel, 0.31% molybdenum, balance titanium.).

>"[A] prior art reference that discloses a range encompassing a somewhat narrower claimed range is sufficient to establish a prima facie case of obviousness." *In re Peterson*, 315 F.3d 1325, 1330, 65 USPQ2d 1379, 1382-83 (Fed. Cir. 2003). However, if the reference's disclosed range is so broad as to encompass a very large number of possible distinct compositions, this might present a situation analogous

to the obviousness of a species when the prior art broadly discloses a genus. *Id.* See also *In re Baird*, 16 F.3d 380, 29 USPQ2d 1550 (Fed. Cir. 1994); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992); MPEP § 2144.08.<

II. OPTIMIZATION OF RANGES

A. Optimization Within Prior Art Conditions or Through Routine Experimentation

Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) (Claimed process which was performed at a temperature between 40°C and 80°C and an acid concentration between 25% and 70% was held to be *prima facie* obvious over a reference process which differed from the claims only in that the reference process was performed at a temperature of 100°C and an acid concentration of 10%.); >see also *Peterson*, 315 F.3d at 1330, 65 USPQ2d at 1382 (“The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages.”);< ** *In re Hoeschele*, 406 F.2d 1403, 160 USPQ 809 (CCPA 1969) (Claimed elastomeric polyurethanes which fell within the broad scope of the references were held to be unpatentable thereover because, among other reasons, there was no evidence of the criticality of the claimed ranges of molecular weight or molar proportions.). For more recent cases applying this principle, see *Merck & Co. Inc. v. Biocraft Laboratories Inc.*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), *cert. denied*, 493 U.S. 975 (1989); *In re Kulling*, 897 F.2d 1147, 14 USPQ2d 1056 (Fed. Cir. 1990); and *In re Geisler*, 116 F.3d 1465, 43 USPQ2d 1362 (Fed. Cir. 1997).

B. Only Result-Effective Variables Can Be Optimized

A particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation. *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977) (The claimed wastewater treatment device had a tank volume to contractor area of 0.12 gal./sq. ft. The prior art did not recognize that treatment capacity is a function of the tank volume to contractor ratio, and therefore the parameter optimized was not recognized in the art to be a result-effective variable.). See also *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980) (prior art suggested proportional balancing to achieve desired results in the formation of an alloy).

III. REBUTTAL OF PRIMA FACIE CASE OF OBVIOUSNESS

Applicants can rebut a *prima facie* case of obviousness based on overlapping ranges by showing the criticality of the claimed range. “The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. . . . In such a situation, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range.” *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990). See MPEP § 716.02 - § 716.02(g) for a discussion of criticality and unexpected results.

A *prima facie* case of obviousness may also be rebutted by showing that the art, in any material respect, teaches away from the claimed invention. *In re Geisler*, 116 F.3d 1465, 43 USPQ2d 1362, 1366 (Fed. Cir. 1997) (Applicant argued that the prior art taught away from use of a protective layer for a reflective article having a thickness within the claimed range of “50 to 100 Angstroms.” Specifically, a patent to Zehender, which was relied upon to reject applicant’s claim, included a statement that the thickness of the protective layer “should be not less than about [100 Angstroms].” The court held that the patent did not teach away from the claimed invention. “Zehender suggests that there are benefits to be